

No. 76-387

Supreme Court, U. S.

FILED

DEC 3 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN PRESTON ROSENBERGER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES IN
OPPOSITION**

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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**MEMORANDUM FOR THE UNITED STATES IN
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Petitioner contends that the affidavit submitted in support of an application for a search warrant was insufficient; that the officers executing the search warrant could not seize items that were not specifically described in the search warrant; and that a twenty-two day delay between the obtaining of information and its use in an affidavit in support of a search warrant was fatal to the search warrant.

After a jury-waived trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of three counts of receiving and possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a)(1).¹ Petitioner was

¹Petitioner had filed a motion to suppress the physical evidence seized by Louisville, Kentucky, police. After the denial of this motion, petitioner was convicted on a stipulated statement of facts.

sentenced to concurrent sentences of eighteen months' imprisonment on Counts One and Two of the indictment; a sentence of eighteen months' imprisonment on Count Three was to be served after completion of the sentences on the other two counts. The court of appeals affirmed in part and reversed in part (Pet. App. 41).² The judgment of the court of appeals was entered on June 23, 1976. The petition for a writ of certiorari was not filed until September 15, 1976 and is therefore out of time under Rule 22(2) of this Court.

The relevant facts, which are set forth in the opinion of the court of appeals, are as follows. A warrant to search petitioner's home was issued on the basis of information obtained from Joann Martin, who provided the Louisville, Kentucky, police with a written statement that she and her husband had sold certain goods to petitioner on December 18, 1974. The affidavit in support of the search warrant stated that the police had probable cause to believe that stolen property and property used as a means of committing a crime were to be found in petitioner's home. The warrant authorized the seizure of a shotgun, a rifle, a chain saw, handguns, marijuana and/or narcotics and dangerous drugs. The affidavit also established that the police had verified the stolen items from police reports. The warrant was issued and executed on January 8, 1975, and the police seized two pistols, a rifle, chainsaw, and amphetamines (Pet. App. 33-34).

Petitioner contends that the search warrant was improperly issued because the supporting affidavit failed

²The court of appeals affirmed the judgment of conviction and sentence on Count One but vacated the judgments of conviction on Counts Two and Three, holding that only one offense is charged under 18 U.S.C. App. 1202(a)(1) regardless of the number of firearms involved (Pet. App. 37-41).

to specify the serial numbers or other identifying marks of the items to be seized (Pet. 9-16) and that, for the same reasons, the subsequent seizure of firearms was unlawful (Pet. 17-18). Petitioner also claims that the delay of twenty-two days between Martin's written statement and the execution of the warrant required the police officers to conduct an independent investigation to corroborate the facts set forth in Martin's statement (Pet. 19-23). All three contentions present issues that depend for their resolution upon the particular circumstances of this case. None of the issues warrants review by this Court.

In any event, the court below properly rejected each of petitioner's contentions. The search warrant was based upon information obtained from an identified informant implicating herself in criminal activity (Pet. App. 34). The information was verified by independent police review of thefts reports (Pet. App. 35). As the court of appeals concluded, the alleged lack of specificity was "not fatal" to this strong showing of probable cause supporting the issuance of the warrant, and the seizure of the three firearms during the search was proper (Pet. App. 35). The police were not conducting a general search of the premises; the warrant authorized only a search for the items mentioned. Among the items enumerated in the search warrant were a rifle and handguns of various calibers and makes. Police knowledge of these firearms came from Martin's oral statement to a police detective. The court of appeals found that "the inclusion of handguns in the affidavit and warrant was the result of using hearsay information furnished by Detective Wood" (Pet. App. 37), and that, as this Court has recognized, hearsay can serve as the basis for issuing a warrant. *Jones v. United States*, 362 U.S. 257, 269.

Finally, the court of appeals properly held that the delay between Martin's statement and execution of the

warrant did not vitiate the probable cause supporting the search because (Pet. App. 36):

under the facts of this case an inference that the stolen property remained in the Rosenbarger home was proper. The assumption that stolen goods delivered to a particular place will be there a mere twenty-one days later is eminently reasonable. We conclude that the Police Judge could properly determine that there was reasonable probability that the goods remained in the Rosenbarger home.

See *United States v. Rahn*, 511 F. 2d 290 (C.A. 10), certiorari denied, 423 U.S. 825; *United States v. Barfield*, 507 F. 2d 53 (C.A. 5), certiorari denied, 421 U.S. 950.³

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

³Petitioner's final contention—that 18 U.S.C. App. 1202(a)(1) is unconstitutional—is effectively precluded by this Court's analysis in *United States v. Bass*, 404 U.S. 336, 350-351. See also *United States v. Day*, 476 F. 2d 562 (C.A. 6); *United States v. Bush*, 500 F. 2d 19 (C.A. 6).